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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-307

GERALD Y. ALLEN,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Gerald Y. Allen, your petitioner, prays that a Writ of Certiorari issue to The United States Court of Claims, to review the judgment of said Court entered in the above-entitled case on May 21, 1971.

OPINIONS BELOW

The opinion in The United States Court of Claims is attached hereto as Appendix A.

JURISDICTION

The dismissal of petitioner's Petition for Back Pay and Allowances and for Reinstatement in the Army, along with the simultaneous granting of defendant's Motion for Summary Judgment, became final when entered.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1255 (1).

QUESTION PRESENTED

Is the decision of this Court in the case of *O'Callahan v. Parker*, 395 U. S. 258, retroactive?

STATEMENT

Your Petitioner, then a master sergeant in the United States Army, was, in February, 1955, stationed at Scholfield Barracks, Oahu, in the Territory of Hawaii.

On May 22, 1955, Petitioner was apprehended by the Honolulu City Police, on suspicion of lewd and lacivious conduct.

On approximately May 24, 1955, Petitioner was charged with lewd and lascivious conduct and assault and battery with intent to humiliate and degrade, under the Revised Laws of Hawaii, and turned over to the military police for disposition.

On July 20, 1955, Petitioner was charged with the commission of a lewd act upon the body of a female under sixteen years of age and indecent masturbation in the presence of the same female, allegedly having occurred on February 20, 1955; further, Petitioner was charged with orally communicating to a female certain obscene language and indecent exposure, allegedly having occurred on May 22, 1955, all in violation of Article 134 of the Uniform Code of Military Justice.

That February 20th and May 22, 1955, the dates of the alleged offenses, were both Sundays on which Petitioner was dressed in civilian clothes and on leave with a weekend pass.

Petitioner was tried by court-martial, convicted on all counts, and given a sentence of 5 years' imprisonment at hard labor, forfeiture of all pay and allowances, and dishonorable discharge.

Petitioner was imprisoned for one and one-half years, forfeited all pay and allowances, and dishonorably discharged.

A Petition for Back Pay and Allowances and for Reinstatement in the Army was filed in The United States Court of Claims on November 3, 1969, alleging that the charges against Petitioner for violation of Article 134 of the Uniform Code of Military Justice, the military trial under those charges, and the subsequent sentence imposed and carried out on petitioner, were all without jurisdiction and in violation of petitioner's Constitutional Rights as guaranteed under Article III §2 of the Constitution of the United States, and the Sixth Amendment thereof.

After a Motion for Summary Judgment by The United States, and on June 12, 1970, The Court of Claims granted Petitioner's Motion for a Stay of the Proceedings Pending Determination by The Army Board for the Correction of Military Records. The decision of The Board is attached hereto as Appendix B.

REASON FOR GRANTING THE WRIT

On February 24, 1971, this Court, in a unanimous decision in the case of *Relford v. Commandant U. S. Disciplinary*, No. 98 October term 1970, speaking through Mr. Justice Blackmun, announced that The Court had not as yet decided whether *O'Callahan, supra,* was retroactive.

This Court in the *Relford* did not reach the question of the scope or retroactivity of *O'Callahan, supra*, having decided the case on other grounds. This Court stated it would reserve that holding for a case that its decision would be dispositive of. Petitioner urges that his is such a case for that decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari be granted.

Respectfully submitted,

ROBIDOUX, HOMER & MAINO
By ROGER L. MAINO
Attorneys for Petitioner.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 460-69

GERALD Y. ALLEN

v.

THE UNITED STATES

BEST AVAILABLE COPY

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

O R D E R

This case comes before the court on defendant's motion, filed February 11, 1970, for summary judgment, and plaintiff's cross-motion, filed January 20, 1971, for transfer pursuant to 28 U.S.C. § 1506 or in the alternative an order dismissing the petition without prejudice, having been submitted without oral argument on the briefs of the parties. Upon consideration thereof, it is concluded that plaintiff's alleged and stated claim is clearly barred by the statute of limitations, 28 U.S.C. § 2501 (see Hamilton v. United States, 192 Ct. Cl. 952 (1970); Wilson v. United States, Ct. Cl. No. 96-70, order dated October 10, 1970; and Mathis v. United States, 183 Ct. Cl. 145, 391 F. 2d 938 (1968)), and,

IT IS THEREFORE ORDERED that plaintiff's said cross-motion filed January 20, 1971, is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

MAY 21 1971

BY THE COURT

JUDGE LARAMORE

Acting for the Chief Judge

EXHIBIT "A"

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
WASHINGTON, D.C. 20310

IN REPLY REFER TO
AGUZ-RSD-SAC Allen, Gerald Y.
RA 19 278 575

4 DEC 1970

Mr. Gerald Y. Allen
2090 Lynnhaven Drive
San Jose, CA 95128

Dear Mr. Allen:

I refer to your application for correction of military records.

The Army Board for Correction of Military Records may deny an application if a sufficient basis for review has not been established.

After examining and considering your Army records and facts you presented, the Army Board for Correction of Military Records determined on 4 November 1970 that insufficient evidence has been presented to indicate probable material error or injustice; accordingly, your application was denied.

In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Notwithstanding the foregoing determination, you may be interested in knowing that you may apply for an Exemplary Rehabilitation Certificate. This is a certificate authorized by Public Law 690, 89th Congress and is a program administered by the Department of Labor. I am inclosing for your information a brochure regarding the certificate.

Your counsel has been furnished a copy of this letter.

Sincerely,

Verne L. Bowers

VERNE L. BOWERS
Major General, USA
Acting The Adjutant General

Inclosure

EXHIBIT "B"

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In the Supreme Court of the United States

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v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

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UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the attention of the Court to the following facts, which show that the petition was filed out of time:

On May 21, 1971, the Court of Claims granted the government's motion for summary judgment and dismissed plaintiff's action on the ground that it was barred by the statute of limitation (Pet. App. "Exhibit A"). No extension of time for filing a petition for a writ of certiorari was obtained, and the petition was not filed until August 30, 1971, 101 days after

the Court of Claims dismissed the action. Since the 90-day period for filing a petition in 28 U.S.C. 2101 (c) is jurisdictional, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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